

**STATE OF MICHIGAN
IN THE SUPREME COURT**

Grievance Administrator, Attorney Grievance
Commission, State of Michigan,
Petitioner-Appellee,

SUPREME COURT NO. 135053

v

ADB: 06-000036-GA

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Respondent-Appellant,

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**Amicus Curiae Brief for the
Majority of the Family Law Section of the State Bar of Michigan**

Proof of Service

This brief reflects the position of the majority of the Family Law Section of the State Bar of Michigan, taken in accordance with its bylaws regarding the following identified matters. The position taken does not necessarily represent the policy position of the State Bar of Michigan. These matters are within the jurisdiction of the Family Law Section.

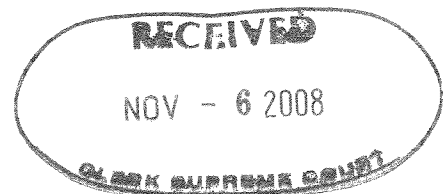


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QUESTION PRESENTED

WHETHER A SPECIFIC PROVISION AUTHORIZING NON-REFUNDABLE RETAINER AGREEMENTS WILL PROVIDE NECESSARY CLARITY AND GUIDANCE WHILE STILL REQUIRING THAT THESE AGREEMENTS CONFORM TO APPLICABLE REASONABLENESS REQUIREMENTS IN THE ETHICS RULES?

The Family Law Section answers yes and advocates for the addition of a provision to MRPC 1.5 specifically addressing nonrefundable retainer agreements.

JURISDICTIONAL STATEMENT

The Family Law Section's request to file an amicus brief is before this Court pursuant to MCR 7.306(D).

STATEMENT OF FACTS

The Family Law Section adopts Appellant's Statement of Material Facts and Proceedings from her Supplemental Brief in Support of Application for Leave to Appeal.

SUMMARY of ARGUMENT

There is nothing in the Michigan Rules of Professional Responsibility that explicitly bars nonrefundable retainer agreements. The instant fee agreement, as well as the fees involved, generally conformed to Michigan Rule of Professional Conduct 1.5(a), which sets out the criteria for determining the reasonableness of a fee. The rule in its entirety provides:

Rule 1.5 Fees.

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or by other law. A contingent-fee agreement shall be in writing and shall state the method by which the fee is to be determined. Upon conclusion of a contingent-fee matter, the lawyer shall provide the client with a written statement of the outcome of the matter and, if there is a recovery, show the remittance to the client and the method of its determination. See also MCR 8.121 for additional requirements applicable to some contingent-fee agreements.

(d) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee in a domestic relations matter or in a criminal matter.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the client is advised of and does not object to the participation of all lawyers involved; and
- (2) the total fee is reasonable.

As the Attorney Grievance Commission hearing panel report specifically stated:

The complexities argued on behalf of the respondent were that one of the parties was a lawyer, that Ms. Sheikh owned the vast majority of the property including the marital home in her own name, that the file came to her with a recent history of assaultive behavior on the part of Mr. Sheikh and that PPOs were in effect. In addition and perhaps most persuasively, respondent argued that by taking this case there was a very real possibility of burning bridges with lawyers in the Sheikh firm as well as those who were professional acquaintances of Mr. Sheikh. The respondent indicated that when she took the file, she understood that this could be a source of problems related to referrals in the future. Having carefully considered the precedent in this area, particularly *Grievance Administrator v Underwood*, Case No. 99-58-GA, decided July 26, 2001, and the *Grievance Administrator v. Boffman*, Case No. 03-135-GA, decided September 28, 2005, we find that under the facts and circumstances of this particular case the fee was not excessive within the meaning of MRPC 1.5(a).

The panel unanimously entered an order of dismissal of the charge against Ms. Cooper. While the Board affirmed the panel's dismissal of the charge under MRPC 1.5a (reiterating that the fee was reasonable), it found the agreement ambiguous and that it violated the ethics rules.

The Family Law Section disagrees with the Board finding as to ambiguity and incorporates Ms. Cooper's arguments. The instant nonrefundable agreement was clear and unambiguous and identified the nature of the retainer. The Section further supports and adopts Ms. Cooper's arguments that the Board erred in finding any ethics violation because the agreement was consistent with existing rules and a lawyer of ordinary prudence would not have been left with a firm conviction that the retainer (and even more so, the smaller amount actually billed) was in excess of a reasonable fee. See Appellant's Supplemental Brief, Issues I-III. Furthermore, because there is no rule barring nonrefundable fees, there was no notice of any

violation.¹

While there is no explicit bar to such an agreement, the Family Law Section believes that a specific authorization of such agreements is prudent and would provide the necessary clarity and guidance for attorneys and their clients and help avoid situations like this case. The Family Law Section's amicus brief focuses on a proposed amendment to MRPC 1.5 addressing non-refundable retainer agreements.

Argument

A SPECIFIC PROVISION AUTHORIZING NON-REFUNDABLE RETAINER AGREEMENTS WILL PROVIDE NECESSARY CLARITY AND GUIDANCE WHILE STILL REQUIRING THAT THESE AGREEMENTS CONFORM TO APPLICABLE REASONABLENESS REQUIREMENTS IN THE ETHICS RULES.

MCL § 600.919² provides that compensation for an attorney is based on the express or implied agreement of the parties, subject to the regulation of this Court. That regulation is found in the Michigan Rules of Professional Conduct [MRPC], including MRPC 1.5 Fees, *supra*; and

¹ It appears that the Board may be using this proceeding to promulgate a new rule, without going through the required process for promulgating new rules of professional conduct. Ms. Cooper should not be found in violation of a rule that does not yet exist.

² **600.919 Fees; solicitation.**
Sec. 919.

(1) The measure of the compensation of members of the bar is left to the express or implied agreement of the parties subject to the regulation of the supreme court.

(2) Any agreement for such compensation, or for reimbursement of any expenses, incident to the prosecution or defense of any claim by any party is wholly void if such professional employment was solicited by the member of the bar, or by any other person acting on his behalf or at his request, unless the services of such member of the bar were first requested by such party.

MRPC 1.16(d).³ MRPC 1.16(d) provides that any unearned portion of a fee must be returned to the client. If appropriately drafted, non-refundable retainer agreements satisfy this requirement.

Non-refundable retainers have always been permitted, within certain constraints. As stated by Thomas Byerly, former Regulation Counsel, in “Legal Fees and Ethics:”

“Ethics opinions allow ‘non-refundable’ retainers if the lawyer and the client reach that

³Rule 1.16 Declining or Terminating Representation.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
- (2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

- (1) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;
- (2) the client has used the lawyer’s services to perpetrate a crime or fraud;
- (3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
- (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take reasonable steps to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law.

understanding and agreement. In ethics opinion RI-010, the ethical requirements for an enforceable non-refundable retainer contract are listed. The required considerations are:

1. the complexity of the case and its likelihood of preempting the lawyer from other work is apparent to the client at the outset,
2. the retainer agreement is in writing, clearly identifies the clients expectations in hiring the lawyer, and unambiguously articulates that the lump sum purchases something in addition to a fixed amount of lawyer hours,
3. the client is of sufficient intelligence, maturity, and sophistication to understand the agreement and that the fee is nonrefundable, and
4. the lawyer in fact sets aside a block of time, turns down other cases, and marshals law firm resources in reliance on the fee agreement."

Once a lawyer receives a non-refundable retainer, the lawyer is considered to have "earned" the fee. Therefore, the earned fee should not be deposited in the lawyers trust account but should be deposited into the lawyer's general business account. RI-069 and R-007. "⁴

Once a lawyer receives a non-refundable retainer, the lawyer is considered to have "earned" the fee." There was no unearned portion of the non-refundable fee for Ms. Cooper to return, so she did not violate MRPC 1.16(d).

Whether a non-refundable fee is reasonable should depend upon the circumstances of the case. See RI-010 (providing in part that each retainer may be judged in its own factual context by the touchstones of reasonableness contained in MRPC 1.5(a)). The criteria of MRPC 1.5(a) apply, in particular MRPC 1.5(a)(1)(complexity of the case) and (2)(preemption of other employment). As discussed above, the instant agreement was reasonable under the applicable criteria, as found by the Board.

Proposed Language:

The Family Law Section suggests the following language for a proposed rule specifically

⁴Byerly, Thomas K., "Legal Fees and Ethics," Focus on Professional Responsibility, Michigan State Bar, July 1999.

authorizing non-refundable retainer agreements to be added as MRPC 1.5(f):

“1.5(f) A lawyer and client may agree to a nonrefundable fee arrangement that is earned by the lawyer at the time of engagement or at the time of agreement, provided that the fee agreement is stated clearly in writing, specifies the factors or considerations that went into determining the fee, is signed by the client, and states that the fee is nonrefundable.”

Obviously, there may be cases where a non-refundable fee is excessive. The determination needs to be on a case-by-case basis under MRPC 1.5(a) and other pertinent law. If an attorney charges a non-refundable fee, he or she must be able to support that under the applicable factors of MRPC 1.5.

CONCLUSION

The Family Law Section supports and adopts the position of Respondent-Appellant Patricia Cooper as set out in her Supplemental Brief In Support of Application for Leave to Appeal. While these rules have been construed in the past to permit non-refundable retainers, an ethics provision that directly addresses non-refundable retainer agreements removes any lingering question concerning the validity and appropriateness of such agreements. The Family Law Section suggests that MRPC 1.5 be revised, as proposed above, to indicate that the nonrefundable fee, and the considerations comprising that fee, be explicitly stated in a written fee agreement.

RELIEF

The Family Law Section of the State Bar of Michigan supports the relief requested by Appellant in this matter and further, requests that this Court consider amendment of the Michigan Rules of Professional Conduct to include a specific rule addressing nonrefundable retainer agreements.

Respectfully submitted,



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